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No. 03-107

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY JO LARA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CITIZENS EQUAL RIGHTS FOUNDATION IN SUPPORT OF RESPONDENT IN PART

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INTEREST OF AMICUS CURIAE

The Amicus Curiae,[1] Citizens Equal Rights Foundation ("CERF") is a foundation established by Citizen's Equal Rights Alliance ("CERA"), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact the constitutional rights of citizens. CERF is particularly concerned that all people who reside within the boundaries of original reservations, and particularly those who reside on fee lands, will be denied the full protection of the United States Constitution if they are made subject to the regulatory and adjudicative authority of tribal government. CERF has a critical interest in this case because CERA has members who own residential, recreational, agricultural and commercial land and businesses within the original boundaries of various Indian reservations in the United States. CERA's members include Indians residing on reservations where they are not members of that tribe. The actions of tribal governments, whether through regulatory or adjudicative authority, have impacted and have the potential to impact the fee owned lands and businesses of the United States citizens and the fundamental rights of individuals who are not members of tribal governments.

All parties have consented by written stipulation to the filing of this Amicus Brief.

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[1] Pursuant to Rule 37.6 of this Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amicus curiae, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This brief focuses on the issue of whether inherent tribal sovereignty over non-members has been terminated by constitutional principles. This issue is central to the determination before the Court, because the Petitioner argues that the amendment to the Indian Civil Rights Act of 1968, 25 U.S.C. 1301(2), that "recognized and affirmed" the "inherent power" of Tribes to "exercise criminal jurisdiction over all Indians" should be read and applied according to its plain language to override the decision in *Duro v. Reina*, 495 U.S. 676 (1990).

To reach this conclusion, the Petitioner claims that the decision in *Duro* can be reversed by congressional enactment. The principles laid down in *Duro* were a logical extension of the Court's decisions in *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191 (1978) and *United States v. Wheeler*, 435 U.S. 313 (1978). If the principles that guided the Court's interpretation in *Duro* were derived from the Constitution, then it is the exclusive province of this Court "to say what the law is" as a core function of its judicial power. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Once the Court has interpreted the Constitution, under its Article III powers, Congress cannot override the decision through legislation. *Cf. Clinton v. City of New York*, 524 U.S. 417, 446-49 (1998) ("change must come not by legislation but through amendment").

The Petitioner argues, however, that the principles of Indian law, including the doctrine enunciated in *Duro*, are mere pronouncements of "federal common law" that fill a gap only until it must yield to the "paramount authority of Congress." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313-14 (1981) *quoting New Jersey v. New York*, 283 U.S. 336, 348 (1931). The Ninth Circuit's decision in

United States v. Enas, 255 F.3d 662 (9th Cir. 2001) (*en banc*) determined that *Duro* was a common law decision subject to congressional modification. *Id.* at 674-75. The Eighth Circuit in the decision below determined that the "distinction between a tribe's inherent and delegated powers is of a constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court." *United States v. Lara*, 324 F.3d 635, 639 (8th Cir. 2003) (*en banc*).

Put simply, this brief addresses the following question: is the claim that Congress has recognized inherent criminal jurisdiction by tribal courts over non-members barred by this Court's interpretation of the requirements of the Constitution, or is this issue subject to complete congressional prerogative under Congress' "plenary power" over Indian affairs. *See, United States v. Kagama*, 118 U.S. 375 (1886). Because constitutional principles have guided and informed nearly two centuries of judicial interpretation, this Court has stated "what the law is": tribal jurisdiction over non-members is "*not* inherent." *Marbury v. Madison; South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) (emphasis in original).

We begin with an in depth examination of the Court's decisions in *Duro*, *Wheeler* and *Oliphant*. All three reveal that the Constitution limits inherent tribal sovereignty, whether the problem is considered from the perspective of the "dependent status" of Indian tribes, the inability of Congress to act contrary to the Constitution, or the rights of citizens.

After examining the constitutional principles laid down in *Oliphant*, *Wheeler* and *Duro*, the Amicus Curiae examine additional constitutional precedents of this Court, both inside and outside of Indian law, in the areas of Tribal Sovereignty, Congressional Power and the Rights of Citizens.

The limits on "inherent tribal sovereignty" are not simply a creation of federal common law. Indeed, the position

advanced by the Petitioner faces two insurmountable obstacles. First, tribes are not only in a "dependent status" in relation to the national sovereign; the ultimate source of sovereignty in the United States is its citizens. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). It is inherently contradictory to argue that the citizens of the ultimate sovereign, who are the original source of the sovereign powers of the national government, can be subject to the lesser "inherent retained jurisdiction" of Indian tribes in a "dependent status."

The second insoluble contradiction is the legislative attempt, in the *Duro* amendment to the Indian Civil Rights Act, to "recognize and affirm" the "inherent power" of tribes over non-member Indians. Since inherent sovereign power over non-members is inconsistent with the dependent status of tribes, *Oliphant*, 435 U.S. at 208, Indian tribes have not held the inherent power to criminally prosecute non-members since they entered into the "dependent status." No power is truly "inherent" if it depends upon the action of another sovereign to recognize, grant, affirm or create it. Yet this is precisely what the *Duro* amendment to the Indian Civil Rights Act attempted.

Not surprisingly, the response of the Eighth Circuit Court of Appeals was an attempt to salvage this unconstitutional effort by finding the amendment was simply a delegation of federal authority that allowed tribes to prosecute non-member Indians. *United States v. Lara*, 324 F.3d at 640.

Justice Randall, in his dissent in *Cohen v. Little Six, Inc.*, 543 N.W.2d 376 (Minn. App. 1996), *aff'd* 561 N.W.2d 889 (Minn. 1997) struggled with the issue of subjecting non-members to tribal court systems. In the area of tribal governance over non-members he asks "how does the federal government give more than it possesses?" *Id.* at 406 (J.

Randall dissent). The answer, of course, is that Congress cannot "give" inherent sovereignty over non-members to tribal governments. When Congress acts, it must act according to the Constitution and any power that it delegates must of necessity be federal power, whose exercise is subject to the Constitution. *Compare*, *Saenz v. Roe*, 526 U.S. 489, 508 (1999).

In the final section, we examine how the rights of all citizens are inconsistent with the claim that tribes retained inherent criminal jurisdiction over non-members.

ARGUMENT

I. Constitutional Principles Guided the Determinations in *Oliphant, Wheeler, and Duro* that Retained Inherent Criminal Jurisdiction Does Not Extend to Non-Members.

The Petitioner argues that the exercise of tribal criminal jurisdiction over non-member Indians has been restricted only by federal common law, leaving Congress free to override judicial pronouncements and thereby "re-establish" inherent tribal sovereignty. Leaving aside the unavoidable contradiction of a separate sovereign recreating inherent power, we examine whether the foundation laid for this court's decision in *Duro* is without constitutional support.

We turn first to *Oliphant* for an analysis of the grounds that supported its holding. Contrary to the Petitioner's position, the Court found that the limits on tribal sovereignty are not transcribed only by treaties, congressional actions, or executive orders.

> But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or

> congressional enactments....Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status*' *Oliphant*, 435 U.S. at 208 [*citation omitted*] (emphasis in original).

Oliphant established that while Congress could terminate retained tribal powers, the dependent status of tribes had already terminated their inherent powers over non-Indians.

Building on its observation that external jurisdictional powers were inconsistent with the dependent status of tribes, the Court noted that tribal reservations are part of the territory of the United States. This fact diminished tribal sovereignty as independent nations, and limited the power tribes might have inherently enjoyed to dispose of lands without the consent of the United States; eliminated tribal power to form political connections with foreign nations; and limited sovereignty so that tribes lost their right of governing every person within their territorial limits except themselves. *Id.* 435 U.S. at 208-209, *citing United States v. Rogers,* 45 U.S. (4 How.) 567, 571 (1846), *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831); and *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810).

Not content with simply describing the dependent status of tribes in light of the national government's preeminent territorial sovereignty created by the Constitution, the Court turned to the fundamental protections granted to its citizens.

> But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their

> personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. *Oliphant* at 210.

The Court closed its decision in *Oliphant* by noting that while tribal court systems have increasingly begun to resemble their state counterparts, and acknowledging that the passage of the Indian Civil Rights Act of 1968 extended certain basic procedural rights to all persons tried in Indian Tribal Court:

> [These factors] have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians. *Id* at 212.

To claim that the principles delineated in *Oliphant* are simply the creation of federal common law ignores the constitutional principles which the court was careful to delineate and distinguish from the treaties, legislative enactments and executive orders that also supported its holding. Since it is exclusively the province of this court "to say what the law is" *Marbury v. Madison*, 1 Cranch at 177, the primacy of judicial interpretations of the Constitution is clearly established.

Sixteen days after the *Oliphant* decision, this Court held in *United States v. Wheeler* that the inherent power of tribes to try and punish its own tribal members was not inconsistent with a tribe's dependent status under our constitutional system and therefore tribes retained this inherent power. As a

result, the double jeopardy defense to a federal prosecution following conviction of the tribal member in Navajo tribal court failed because the criminal prosecution arose from the tribe's inherent sovereignty, not delegated federal power. *Id.* 435 U.S. at 322-26. *Compare*, *Heath v. Alabama*, 474 U.S. 82, 88 (1985).

Twelve years after *Oliphant* and *Wheeler*, the court was faced with the case "at the intersection" of these two precedents in *Duro v. Reina,* 495 U.S. at 684. The *Duro* court examined judicial precedents that define the parameters of tribal power in relationship to non-members, beginning with the restrictions on territorial sovereignty. *Wheeler*, the *Duro* court reasoned, revealed "the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order." *Id.*, 495 U.S. at 685-86. An "implicit divestiture of sovereignty" occurs for relations between an Indian tribe and non-members of the tribe, as a result of the tribe's "dependent status." *Id.*

Montana v. United States, 450 U.S. 544 (1981) held that "the principles on which [*Oliphant*] relied support the general proposition that the inherent sovereign powers of an Indian tribe did not extend to the activities of non-members of the tribe." *Duro*, 495 U.S. at 687 *citing Montana*, 450 U.S. at 565. Finding that criminal jurisdiction "involves a far more direct intrusion on personal liberties," the Court held that for criminal jurisdiction purposes, a non-member Indian's "relations with this Tribe are the same as the non-Indian's in *Oliphant*." *Duro*, 495 U.S. at 688.

Lest there be any doubt as to the constitutional basis for its decisions, the Court in *Duro* made these critical holdings:

> Whatever might be said of the historical record, we must view it in light of Petitioner's status as a citizen of the

> United States....Indians like other citizens are embraced within our Nation's 'great solicitude that its citizens be protected...from unwarranted intrusions on their personal liberty.' *Oliphant,* 435 U.S. at 210.
>
> We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them. As full citizens, Indians share in the territorial and political sovereignty of the United States. The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority. *Duro*, 495 U.S. at 692-93.

The Court in *Duro* carefully considered the nature of tribal courts including the unique customs, the lack of judicial independence and unfamiliar practices. "It is significant that the Bill of Rights does not apply to Indian tribal government." *Id.*, citing *Talton v. Mayes*, 163 U.S. 376 (1896). While noting that the Indian Civil Rights Act of 1968 provided some procedural safeguards, "these guarantees are not equivalent to their constitutional counterparts" including the right to appointed counsel. *Duro*, 495 U.S. at 693.

> Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. *Cf. Reid v. Covert*, 354 U.S. 1 (1957). We have approved

> delegation to an Indian tribe of the authority to promulgate rules that may be enforced by criminal sanctions in *federal* Court, *United States v. Mazurie*, 419 U.S. 544 (1975), but no delegation of authority to a tribe has to date included the power to punish non-members in *tribal* Court. We decline to produce such a result through recognition of inherent tribal authority." *Duro,* 495 U.S. at 693-94. (emphasis in original)

The Court in *Duro* examined the basis of tribal criminal jurisdiction over its own members. In doing so, the Court recognized that the fundamental principles imbedded in the Declaration of Independence and the Constitution, that all legitimate governmental authority is derived from the consent of the governed, is equally applicable to the limitations placed on the retained powers of tribal government.

> Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in tribal government, the authority of which rests on consent. This principle finds support in our cases decided under provisions that predate the present federal jurisdictional statutes. …
>
> With respect to such internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country. … [noting that the Bill of Rights is inapplicable to tribes and there is no federal cause of action under the Indian Civil Rights Act] … **This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system.**

> *Duro*, 495 U.S. at 694 (citations omitted) (emphasis added).

Whether the question of inherent tribal sovereignty is considered from the perspective of tribal sovereignty, Congressional power or the rights of all American citizens, in each instance the Constitution informs and guides judicial interpretation.

1. **Tribal Sovereignty.** The "dependent status" of tribes by implication limits their inherent jurisdiction, and the only retained jurisdiction is derived from the consent of the governed (i.e. tribal members) that is the "fundamental basis for power within our constitutional system."
2. **Congressional Power.** "Constitutional limitations" prevent Congress from subjecting "American citizens to criminal proceedings before a tribunal" that does not provide full "constitutional protections."
3. **The Rights of Citizens.** All citizens are protected by the Constitution and the Bill of Rights which are not fully applicable to Indian tribal governments. Given that all Indians are now also United States citizens, their rights as U.S. citizens cannot be diminished through the exercise of "inherent tribal sovereignty" by any tribe unless the citizen is a member of that tribe.

Drawing on this trilogy of constitutional principles, *Duro* reached the inescapable conclusion that the inherent criminal jurisdiction of an Indian tribe does not and cannot extend to the activities of non-members of the tribe.

II. Interpreting the Constitutional Limitations on Inherent Tribal Sovereignty are the Exclusive Province of this Court.

A. The Dependent Status of Tribes is Derived from Constitutional Principles Which Hold that Tribal Criminal Jurisdiction Over Non-Members is Inconsistent with their Dependent Status.

An examination of the "dependent status" of tribes requires an examination of the so-called Marshall Trilogy, *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). The nature of title that the Indian tribes held to land arose in *Johnson v. M'Intosh*, where the Court determined that the right of conquest or discovery left the Indian tribes with a possessory right that was subject to complete defeasance. Chief Justice Marshall in his opinion relied in part on the decision in *Fletcher v. Peck*, where Justice Johnson reasoned that as a necessary consequence of the restricted title that Indian tribes held to the soil, tribal sovereignty was limited to the right of governing only "themselves." *Id.* 6 Cranch at 147 (J. Johnson concurring).

In *Cherokee Nation v. Georgia*, Chief Justice Marshall described Indian tribes as "domestic dependent nations." *Id.* 5 Pet. at 17. The United States asserts a title to the land occupied by the Indian tribes independent of their will, while these tribes are "in a state of pupilage" [which] "resembles that of a ward to his guardian." *Id.* In determining that tribes were not "foreign nations" but rather "domestic dependent nations," Justice Marshall found support in his interpretation of Article I, §8 "which empowers congress to 'regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'" *Cherokee Nation*, 5 Pet. at 18. Tribes are not "foreign nations" and their sovereignty was therefore of necessity more limited. Justice Johnson again wrote a concurring opinion to

address the "Constitutional questions" presented. *Id.* 5 Pet. at 20.

In *Worcester*, Chief Justice Marshall held that the federal government held exclusive power, as a result of the Constitution, to regulate with regard to the Cherokee Nation. Accordingly, the Cherokee Nation, as a distinct community, occupying its own territory, was completely separated from the States, and state law could have no force within those lands. *Id.* 6 Pet. at 557-61. In *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), the court noted that the "platonic notions of sovereignty" that guided Chief Justice Marshall in *Worcester* had lost their independent sway over time. *County of Yakima*, 502 U.S. at 257.

Unquestionably, interpretation of the Constitution lies at the heart of the Supreme Court's determination of the "dependent status" of Indian tribes. Those factors included both the language of the Commerce Clause, as well as the primacy represented by the United States as the supreme sovereign over all within her jurisdiction. The national sovereignty was created by the people through the Revolutionary War and expressed through the Constitution which creates "the government of the union." *See, Worcester*, 6 Pet. at 561. Congress is no freer to alter these constitutional principles central to our heritage and history than the Court is free to deny the title obtained by the conqueror. *See, e.g. Johnson v. M'Intosh*, 6 Pet. at 588.

One of the clearest statements by the Court that the existence of complete sovereign power is expressed through the Constitution is found in *United States v. Kagama*:

> Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the

> United States, or of the states of the Union. There exist within the broad domain of sovereignty but these two.

United States v. Kagama, 118 U.S. at 379; *also cited* in *Oliphant*, 435 U.S. at 211. This statement from *Kagama* clearly indicates that Congress in the exercise of "political control" can further restrict tribal sovereignty. *Kagama* cannot be read as authority for Congress to expand or recreate tribal inherent sovereignty. *See also*, *Nevada v. Hicks*, 533 U.S. 353, 366 (2001) referencing our "system of dual sovereignty," citing *Kafflin v. Levitt*, 493 U.S. 455, 458 (1990). The Tenth Amendment reserved for the States and the people all powers not granted to the government of the Union.

Montana v. United States, termed the "pathmarking case," relied upon the principles set forth in *Oliphant* to reach the conclusion that:

> Where nonmembers are concerned, the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribe, and so cannot survive without express congressional delegation." *Hicks*, 533 U.S. at 359, quoting *Montana*, 450 U.S. at 564 (emphasis in *Hicks*).

South Dakota v. Bourland, 508 U.S. 679 (1993) held that "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express delegation,' 450 U.S. at 564, and is therefore *not* inherent." *Bourland*, 508 U.S. at 695 n. 15 (emphasis in original).

As we have seen, the principles laid down in *Oliphant* are derived from both fundamental principles that underlie the Constitution and constitutional interpretations that limit "the retained inherent powers" of dependent tribes. Also clear is

that just as "Indians are within the geographical limits of the United States" (*Kagama*, 118 U.S. at 379), "an Indian reservation is considered part of the territory of the State," *Hicks*, 533 U.S. at 361. "[L]ong ago" the Court departed from Chief Justice Marshall's territorial limitations on states in *Worcester*. *Hicks*, 533 U.S. at 361. The court observed that the holding in *Worcester* must be considered in the light of the specific treaty with the Cherokee Nation that guaranteed that the land would not be subject to state jurisdiction. *Hicks*, 533 U.S. at 362, n.4.

Properly understood, the power of Congress over Indian affairs allows Congress to restrict the exercise of retained inherent sovereignty, just as Congress could limit the "States' inherent jurisdiction on reservations." *Hicks*, 533 U.S. at 365, citing *Draper v. United States*, 164 U.S. 240, 242-243 (1896). But Congress cannot expand or recreate inherent tribal criminal jurisdiction over non-members as it attempted by amending 25 U.S.C. §1301, because that limitation is derived from constitutional principles long enunciated by the Supreme Court and not simply federal common law.

B. The Fundamental Constitutional Rights of All Citizens Cannot be Diminished by Congressional Action that is Inconsistent with the Requirements of the Constitution.

Throughout the brief of the Petitioner, as well as in some amicus curiae briefs in support of the Petitioner, are repeated claims regarding the efficiency or necessity of allowing tribes to exercise criminal jurisdiction over all non-member Indians to eliminate a jurisdictional gap. The fact that non-Indian citizens, who comprise half of the residents on reservations across the

United States,[2] are not subject to tribal criminal jurisdiction without a significant jurisdictional gap, and that the same system could be applied to non-member Indians, has been ignored. More important, however, is the failure of the Petitioner and its amicus curiae supporters to recognize a more fundamental difficulty in the argument advanced. Except during hostilities or for military personnel, this Court has never sanctioned a diminution of the fundamental constitutional protections of American citizens within the United States in exchange for efficiency or convenience.

In *Reid v. Covert*, the Court was asked to determine the constitutionality of a statute that allowed family members of U.S. military personnel who were living overseas to be subject to trial by military tribunals, under military regulations and procedures, for criminal offenses. The statute deprived military dependents of trial in civilian courts, under civilian laws, and with the safeguards of the Bill of Rights. In rejecting the very efficiency argument now advanced by the Petitioner, the Court reasoned as follows:

> [The concept that the] Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and would undermine the basis of our government. *Id.*, 354 U.S. at 14. (plurality)

Reid carefully delineated the constitutional limitations on congressional power that prevent Congress from subjecting

[2] *See, Oliphant*, 435 U.S. at 202 n. 13; *Duro*, 495 U.S. at 695. Two-thirds of Indian lands allotted under the Dawes Act were acquired by non-Indians, *County of Yakima*, 502 U.S. at 255-56.

citizens to criminal prosecution by a tribunal that does not provide all of the constitutional protections.

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which is the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Id.*, 354 at U.S. 5-6 (plurality) (footnotes omitted).

Of particular importance is the court's citation to *Marbury v. Madison*, 1 Cranch at 176-180 in support of the constitutional interpretation quoted above.

All tribal lands are contained within the territorial jurisdiction of the United States, and ordinarily are considered part of the territory of a state. *See, Kagama*, 118 U.S. at 379 and *Hicks*, 533 U.S. at 361. The analogy to *Reid*'s holding regarding the limitations on military and foreign policy imposed by the Bill of Rights applies with equal, if not greater, authority to the claim that Congress in the exercise of "plenary power" over Indian affairs can expand inherent tribal jurisdiction over non-members within the United States, thereby "stripp[ing] away" essential constitutional protections. *Id.*, 354 U.S. at 6.

"The language of Art. III, s 2 manifests that constitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as here at home." *Reid*, 354 U.S. at 7. "[O]nce a

territory becomes 'incorporated' all of the constitutional protections became 'applicable.'" *Id.* 354 U.S. at 13 n. 26 [citation omitted]. The Court in *Duro* cited *Reid* for its holding that Congress cannot subject American citizens to criminal proceedings before a tribunal that does not provide full constitutional protections. *Duro*, 495 U.S. at 693-94.

One of the constitutional rights the court focused on in *Reid* was the right to trial by jury before a civilian judge and by an independent jury picked from the "common citizenry," a fundamental right in view of the heritage and history of the Constitution and the Bill of Rights. *Id.* 354 U.S. at 9. The Court observed, for example, that the right to trial by jury is twice guaranteed by the Constitution. *Id.*

Moreover, the court traced the fundamental importance of the jury trial to Blackstone who referred to it as "the glory of the English law" and "the most transcendent privilege" because no citizen can be "affected either in his property, or his liberty or his person, but by the unanimous consent of twelve of his neighbors and equals." *Id.* citing 3 *Blackstone's Commentaries* 379 (internal citations omitted). As De Tocqueville observed:

> The institution of the jury ... places the real direction of society in the hands of the governed, or a portion of the governed, and not in that of the government. . . . He who punishes the criminal is . . . the real master of society." *Reid* 354 U.S at 10 n.13, *citing* 1 De Tocqueville, *Democracy in America* (Reeve trans. 1948 ed.), 282-283.

When rejecting one of the precedents urged upon the court in *Reid* as authority to support the trial of civilians in military tribunals, *In Re Ross*, 140 U.S. 453 (1891), the Court observed that the decision in *Ross* had been repudiated. At

issue in *Ross* was the power of an American Consul to try American citizens charged with committing crimes in which the Consuls could and did make criminal laws, initiate charges, arrest alleged defenders, try them and punish them. "Such a blending of executive, legislative, and judicial powers in one person or even in one branch of the Government is ordinarily regarded as the very acme of absolutism." *Reid*, 354 U.S. at 11. As Justice Souter noted in his concurring opinion in *Nevada v. Hicks*:

> **Tribal Courts also differ from other American Courts** (and often from one another) in their structure, in the substantive law they apply, and **in the independence of their judges**. *Id.*, 533 U.S. at 384 (J. Souter concurring) (emphasis added)

Even if Congress has the power to subject non-member Indians to criminal proceedings in tribal courts as a delegation of federal power, an issue we do not directly address, that jurisdiction could not be exercised except according to the Constitution's requirements under *Reid* and *Duro*. [3] Since tribes are not subject to the Bill of Rights and the Fourteenth

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[3] The Respondent Billy Jo Lara acquiesced to the tribal court proceeding without the benefit of counsel in accordance with the federal legislative mandate at issue herein. Denying Mr. Lara the benefit of double jeopardy protection after he was sentenced and punished, as the Petitioner urges, is unfairly harsh under the circumstances. Mr. Lara may well have been successful in asserting both equal protection and due process defenses to this federal delegation of criminal jurisdiction. It is difficult to fault a defendant who was without the benefit of counsel when the absence of counsel is a foreseeable consequence of the *Duro* amendment to the Indian Civil Rights Act, 25 U.S.C. §1301(2). Accordingly, the amicus curiae do not directly address the issue of whether the tribal court prosecution should have been barred by equal protection or by the improper delegation of federal power to the tribal court.

Amendment under *Talton v. Mayes,* 163 U.S. at 382, 385, it necessarily must follow that Congress has no authority to subject Indian non-members to tribal criminal procedures except as a delegation of federal power accompanied by full constitutional protections, which may not be possible.

The ability of Congress to restore inherent tribal sovereignty is not determined merely by federal common law, but instead is limited by this Court's interpretation of fundamental constitutional principles. We turn next to the third source of limitations on inherent tribal sovereignty, namely the rights of American citizens.

C. The Citizenship of the Indian People Operates to Limit the Inherent Power of Tribal Governments Over Non-Members.

The third constitutional basis for the determination that retained tribal inherent sovereignty does not extend to Indians who are not members of the tribe arises from their status as American citizens. *Duro* observed that the historical record must be viewed in light of the status of an Indian as a citizen of the United States. *Id.* 495 U.S. at 692. The initial source of American citizenship for Indians began in the allotment and tribal termination era in the late 1800's,[4] but all tribal members became citizens in 1924.

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[4] Indeed, a unique problem is created for those tribal members who became American citizens under the Dawes Act, 24 Stat. 388-91 (Feb. 8, 1887). Section 6 provides that the "Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." *Id.* Since Section 6 of the Dawes Act also provides full American citizenship to that class of Indians, it is difficult to see how any Indian whose citizenship arose from the Dawes Act could be denied the benefits and burdens, both civil and criminal, of state law. This nearly impossible jurisdictional nightmare could never be sorted out by granting inherent tribal

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided,* That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property. Public Law No. 68-175 (1924), current version at 8 U.S.C. §1401(b).

Nothing in the Indian Citizenship Act of 1924 suggests that Indians are less than full citizens of the United States, and the additional provision in the grant of citizenship quoted above reserved rights to tribal or other property; i.e., **the rights Indian citizens enjoyed as members in their particular tribe** were not impaired or otherwise affected.

The Constitution of the United States makes clear that we have only one class of citizens. *Compare, Saenz v. Roe,* 526 U.S. at 502-504 (each citizen has "an equality of rights with every other citizen,") quoting the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 112-13 (1872) (J. Bradley dissenting). Indeed, the Framers of the Constitution were concerned that there be no rights of nobility which would of necessity create citizens with an inferior status. *See* Article I, §9 of the Constitution. Of course, the historical record is replete with evidence that the battle for equality was not against nobility, but to secure the principle that all persons are guaranteed the full rights of citizenship. This process was not accomplished, however, without a civil war, post-civil war constitutional amendments, women's suffrage, and the civil rights movement and legislation.

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jurisdiction over some non-member Indians.

Given the painful lessons learned by this process, any suggestion that Indian citizens should somehow be denied full constitutional protections, under any circumstance other than voluntary membership in their own tribe, is inherently suspect.[5] "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000), *quoting Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). The court has justified exceptions to this doctrine for tribes on the theory that "retained tribal authority relates to self-governance." *Rice*, 528 U.S. at 518, explaining the hiring preference allowed by *Morton v. Mancari*, 417 U.S. 535 (1974). Given that "tribes are not mere fungible groups of homogeneous persons" and that non-member Indians enjoy no greater rights in a tribe than non-Indians, the justification for inherent tribal sovereignty, namely voluntary membership in a dependent sovereign, ends with that tribe's members. *Duro*, 495 U.S. at 695.

Whatever plenary power Congress exercises in dealing with Indians as a class, *Duro*, 495 U.S. at 692, Congress simply does not enjoy "plenary power" over American citizens. *Id.*, 495 U.S. at 693. It is at this point that congressional power and tribal jurisdiction collide with the rights of citizens. Tribal

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[5] This Court has twice noted, in both *Duro*, 495 U.S. at 693 and *Hicks*, 533 U.S. at 383-385, (J. Souter concurring) the "special nature" of Indian tribunals. William J. Lawrence, publisher of the Native American Press/Ojibway News (presson@isd.net) and a member of the Red Lake Band of Chippewa Indians in Minnesota, has examined the problematic nature of tribal government in relationship to tribal members. *See*, William J. Lawrence, "In Defense of Indian Rights," *Beyond the Color Line, New Perspectives on Race and Ethnicity in America*, Abigail & Stephan Thernstrom, ed., Hoover Institution Press (2002). Given the concerns about the quality of justice rendered by tribal courts both historically and as a contemporary matter, the Court should be hesitant to permit any extension of inherent tribal sovereignty over Indian non-members.

authority, like all governmental authority, is derived only from the consent of the governed under our constitutional system. *Duro*, 495 U.S. at 694, *citing Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172-173 (1982) (Stevens, J. dissenting). This constitutional doctrine was enunciated by Justice Matthews in the landmark case of *Yick Wo v. Hopkins*, as follows:

> Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of the government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.

Id., 118 U.S. at 370.

The central feature of the American representative system of government is that the people of the United States are the sovereign, and this Body Politic has the power to create the Constitution that controls the sovereign powers and governmental powers delegated by the people to the federal government. *See*, John R. Tucker, *The Constitution of the United States: A Critical Discussion of its Genesis, Development and Interpretation* (Henry St. George Tucker, ed., Fred B. Rothman & Co. 2000) (1899), Vol. 1, p. 62.

This principle is recognized in the United States Constitution that begins "We the People...." The just powers of government over its citizens are derived only from the consent of the governed, and that consent is conditioned on the right of those citizens to participate in that government through the right of suffrage and by holding elective office. *See, Yick Wo*, "the political franchise of voting" is the "fundamental political right...preservative of all rights." *Id.* 118 U.S. at 370. The Declaration of Independence, in Paragraph 2, established this "self-evident" truth as part of our history and heritage.

This same principle was reaffirmed by the United States Constitution. Being enrolled as an Indian in a federally recognized tribe can only subject an American citizen to the inherent authority of the tribe in which the individual is an enrolled member. It is this voluntary participation in tribal government that is the source of authority which depends on consent. *Duro*, 495 U.S. at 694.[6] There is simply no constitutional basis to distinguish Indians who are citizens of the United States from non-Indians for the purpose of inherent tribal jurisdiction except tribal membership.

It would be anomalous indeed, at a time when our armed forces are deployed in two distant lands for the avowed purpose of instituting democratic governments as the only antidote to terrorism, that we would sanction within our own territorial limits a doctrine that would grant tribal governments inherent power over American citizens, depriving those citizens of both the Bill of Rights and the right to participate in tribal government. As *Duro* observed, as to their internal laws and usages, tribes are left with a broad freedom not enjoyed by any other governmental authority in the United States, reason enough not to expand that power. *Id.* 495 U.S. at 694.

The fundamental promise of the United States Constitution is a representative government with divided governmental powers derived from the consent of the governed. That

[6] *Duro* rejected the suggestion that because non-members reside on reservations, or have ties to the tribe through marriage or employment, there are sufficient "contacts" to furnish a basis for jurisdiction. That argument was "little more than a variation of the [previously rejected] argument that any person who enters an Indian community should be deemed to have given implied consent to tribal criminal jurisdiction over him." *Id.*, 495 U.S. at 695. "Consent of the governed" means more than residence or physical presence, and instead requires the rights of citizenship. *Compare, Id.*, 495 U.S. at 694, explaining how a non-Indian, by adoption into a tribe, could "make himself amenable to their laws and usages," thereby giving consent. *Id.*

constitutional promise to Indians as American citizens cannot be denied by congressional action that purports to recognize inherent tribal criminal jurisdiction over non-members. "Indians like all other citizens share allegiance to the overriding sovereign, the United States." *Duro*, 495 U.S. at 693. The United States, in turn, owes its citizens who are Indians undiminished rights of citizenship. The Constitution does not allow for a society with two classes of citizens, Indian and non-Indian.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals that the amendment to the Indian Civil Rights Act, 25 U.S.C. §1301(2), could not restore inherent tribal criminal jurisdiction over non-member Indians.

Respectfully submitted,

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